Supreme Court, U.S.
FILED

02 571 OCT 16 2002

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No. 02-_____

IN THE

Supreme Court of the United States

EBONY PATTERSON, ET AL.,
PETITIONERS,
V.
JENNIFER GRATZ AND PATRICK HAMACHER,
AND
LEE BOLLINGER, JAMES J. DUDERSTADT, THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
RESPONDENTS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a university policy that considers race and ethnicity as one of several factors in its admissions process justified under the Equal Protection Clause of the Fourteenth Amendment both by a compelling interest in assembling a diverse student body, and a compelling interest in remedying past and present discrimination at the university, whether or not the university articulates the remedial justification as a basis for the policy?

PARTIES TO THE PROCEEDING

Petitioners are Ebony Patterson, Ruben Martinez, Laurent Crenshaw, Karla R. Williams, Larry Brown, Tiffany Hall, Kristen M.J. Harris, Michael Smith, Khyla Craine, Nyah Carmichael, Shanna Dubose, Ebony Davis, Nicole Brewer, Karla Harlin, Brian Harris, Katrina Gipson, Candice B.N. Reynolds, by and through their parents or guardians, Denise Patterson, Moises Martinez, Larry Crenshaw, Harry J. Williams, Patricia Swan-Brown, Karen A. McDonald, Linda A. Harris, Deanna A. Smith, Alice Brennan, Ivy Rene Carmichael, Sarah L. Dubose, Inger Davis, Barbara Dawson, Roy D. Harlin, Wyatt G. Harris, George C. Gipson, Shawn R. Reynolds, and Citizens for Affirmative Action's Preservation. They are defendant-intervenors in the District Court and appellants in the Court of Appeals.

Respondents are Jennifer Gratz and Patrick Hamacher. Respondents were plaintiffs in the District Court and were appellees in the Court of Appeals with respect to intervenors' appeal.

Additional Respondents are Lee Bollinger, James J. Duderstadt, and the Board of Regents of the University of Michigan. These respondents were defendants in the District Court and were appellees in the Court of Appeals with respect to intervenors' appeal.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Patterson, *et al.* (defendant-intervenors below) ("intervenors") respectfully request that this Court issue a writ of certiorari to review a judgment of the United States District Court for the Eastern District of Michigan that is presently pending on appeal in the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Michigan granting summary judgment against intervenors, and rejecting their claim that the University of Michigan ("University") was justified in considering race in its admissions policy in order to remedy the effects of past and present discrimination, is reported as *Gratz v. Bollinger*, 135 F. Supp. 2d 790 (E.D. Mich. 2001) (App. 66a).[1] The Court of Appeals has not yet ruled on the appeal of that decision.

The opinion of the district court on the other parties' cross-motions for partial summary judgment, dealing with the question whether the University could consider race as an admissions factor in order to achieve a diverse student body, is reported as *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (App. 1a). The Court of Appeals has not yet ruled on the appeal of that decision. Plaintiffs in this action have filed a separate Petition seeking review of that ruling, No. 02-516 in this Court (filed October 1, 2002).

The opinion of the United States Court of Appeals for the Sixth Circuit in the related case of *Grutter v. Bollinger* is reported at 288 F.3d 732 (6th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3154 (August 9, 2002) (No. 02-241) ("*Grutter*").

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[1]Citations in this form are to the Appendix to the Petition in *Gratz v. Bollinger*, No. 02-516.

JURISDICTION

The district court entered judgment pursuant to Fed. R. Civ. P. 54(b) on March 21, 2001 with respect to intervenors' claim that the University's use of race in admissions was justified as a remedy for the present effects of past and continuous discrimination (App. 95a). Intervenors' appeal from that decision was docketed in the Court of Appeals as No. 01-1438.[2]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), which provides for review by writ of certiorari of any case pending in the court of appeals, even if final judgment has not been entered by that court. *See also* 28 U.S.C. § 2101(e) ("An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment."). *See infra* at pp. 17-20.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

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[2]The District Court had previously issued an order on January 30, 2001 certifying two questions for interlocutory review pursuant to 28 U.S.C. § 1292: (1) whether a public university has a compelling interest in achieving the educational benefits of diversity that will justify the consideration of race as a factor in admissions; and (2) if so, whether the admissions systems employed by the University of Michigan from 1995 to 2000 were properly designed to achieve that interest (App. 56a). Cross-appeals on those questions were docketed in the Court of Appeals as Nos. 01-1333, 01-1416, and 01-1418. Intervenors have argued in support of diversity as a compelling state interest in those appeals.

2. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, states:

> No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

STATEMENT OF THE CASE

A. Introduction

At stake in these extraordinary cases (*Grutter* and *Gratz*) is whether the University of Michigan (and, by extension, other institutions of higher education) may consciously consider race in its admissions decisions to achieve the educational benefits that flow from a diverse student body and to remedy the effects of prior discrimination in which it participated. Meaningful but modest integration did not come to the University fortuitously. It was and is the consequence of affirmative efforts to overcome past discrimination and the educationally limiting impact of racially isolated classroom and campus settings.

As the respective plaintiffs in both *Grutter* and this case have noted in their petitions for certiorari, the courts of appeals have divided on this issue of profound national importance in prior higher education affirmative action cases. *See Gratz* Petition, No. 02-516 at 20-24 (citing cases); *Grutter* Petition, No. 02-241 at 21-25 (citing cases). Both *Grutter* and *Gratz* have fully developed records, and full representation of all interested parties. Were the Court to grant the writs sought by those petitioners as well as by intervenors here, it will have before it all of the parties and questions necessary to resolve this issue definitively.

Like the *Gratz* plaintiffs, petitioners believe the Court should exercise its discretion under Rule 11 of its Rules and grant a writ of certiorari before judgment to the United States Court of Appeals for the Sixth Circuit, which has not yet entered judgment on the various appeals pending before it in the *Gratz* case.

Like *Grutter*, the *Gratz* case presents the vital issue of whether diversity is a compelling governmental interest that justifies the use of race-conscious admissions in higher education. Both cases present an additional issue arising from the confusion in the lower courts about the availability of remedial justifications for the use of race as a factor in university admissions. In both cases, the University was understandably unwilling to admit its own past discrimination as a justification for its policies. The Court of Appeals recognized this, and, in ordering intervention as of right in both cases, found that the University was "unlikely to present evidence of past discrimination by the University itself or of the disparate impact of some admissions criteria and . . . these may be important and relevant factors in determining the legality of a race-conscious admissions policy." *Grutter v. Bollinger*, 188 F.3d 394, 401 (6th Cir. 1999). The district court, however, then effectively rejected as irrelevant the "strong basis in evidence" of discrimination presented by intervenors, *see City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989), because the University would not admit to the evidence of its past or present discrimination.

If the Court is going to consider the diversity question, it should grant certiorari in both *Grutter* and *Gratz*, because the cases present the issue in different contexts. The undergraduate admissions scheme administered by the University is typical of a large institution in which, as a matter of expediency, the overwhelming number of applicants leads to a rating system in which admissions criteria are assigned numerical values. The

law school, while processing a significant number of applicants, is nonetheless able to provide somewhat greater individual attention to each application. Moreover, diversity at each level of study has special importance for differing reasons. In the undergraduate setting, student life outside the classroom, in student organizations, in dormitories, and on athletic teams, is as much a part of the educational experience as is the classroom experience, and for many students, undergraduate study offers their first exposure to heterogeneity and the rich diversity of backgrounds that characterizes our nation. In law schools, most classroom instruction heavily emphasizes the clash of viewpoints and arguments as a means of developing and sharpening analytic skills, a pedagogy that the record in *Grutter* indicates is enriched by student diversity.

In addition, in order for the Court to have all relevant issues before it, the Court should grant *this* petition for certiorari. The University contends that diversity is a compelling interest because of its educational benefits, as do the present petitioners. However, the school's unwillingness to advance an equally compelling interest supporting its admissions policy should not cause this Court to ignore the substantial body of evidence suggesting that the University had long treated minority applicants and students in a racially discriminatory fashion. Here, the intervenors presented more than sufficient proof to establish a strong basis in evidence that remediation of past and present discrimination by the University and its officials is also a compelling justification for considering an applicant's race or ethnicity as one factor in making admissions, but that evidence was deemed irrelevant since it was not proffered by the University.

This Court needs to resolve the implications of a rule that prohibits others, such as intervenors here, from introducing evidence to support a remedial justification for a university's policies that the institution itself has not, for whatever reason,

offered. The administration of justice will be best served by having all issues before the Court at one time on the most complete possible record. If the Court is going to address the University's admissions program, therefore, petitioners respectfully request that the Court grant this petition, the *Gratz* plaintiffs' petition, and the petition in *Grutter,* and set the matters for argument in tandem.

B. Prior Proceedings[3]

1. The District Court

In 1997, the *Gratz* plaintiffs, two white individuals who were denied admission to the University of Michigan's undergraduate School of Literature, Science, and the Arts ("LSA"), filed this lawsuit on behalf of themselves and a class, alleging that the University's admissions policies unlawfully discriminated against white applicants (JA 34). The University answered by defending its use of race to achieve a diverse student body (JA 148).

Also in 1997, the *Grutter* plaintiffs, other unsuccessful white applicants, represented by the same lawyers as the *Gratz* plaintiffs, sued the University of Michigan's law school making virtually identical allegations. The University answered with the same defense. Although both cases were filed in the Eastern District of Michigan, raised identical legal issues, and included the same counsel, they were assigned to two different district court judges and were not consolidated.

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[3]Some of the statement of facts contained in the petition herein are based on a "Joint Summary of Undisputed Facts" that was submitted by the parties to the district court (App.106a-118a). Additional citations herein are to documents contained in the Joint Appendix ("JA") filed by the parties in the Sixth Circuit.

In 1998, various affected parties sought to intervene in each case. Seventeen African-American and Latino high school students and Citizens for Affirmative Action's Preservation ("CAAP") moved to intervene in the *Gratz* case. Intervenors sought to join the University in defending the use of race to achieve a diverse student body. Intervenors also sought to advance a remedial justification for the University's admissions policies based on past and present discrimination against African-American and Latino applicants and students. A number of individuals and organizations sought intervention in the *Grutter* case with similar aims.

Both district court judges denied intervention. Proposed intervenors appealed and a single panel of the Sixth Circuit heard argument in both cases on the same day. The Sixth Circuit reversed, finding that intervenors had substantial legal interests at stake, and ordered intervention as of right in both cases. *Grutter v. Bollinger*, 188 F.3d 394, 401 (6th Cir. 1999).

In the *Gratz* case, the plaintiffs and the University each moved for summary judgment on the basis of a stipulated record. Intervenors joined the University's position that diversity is a compelling state interest justifying a narrowly tailored admissions program that considers race as one of many factors. In addition, intervenors argued that the extensive evidence of past and present discrimination by the University would, by itself or in conjunction with the academic interest in diversity, justify the use of race in admissions. Plaintiffs admitted that a diverse student body would provide educational benefits to all students, but nevertheless argued that these benefits should be denied as violations of law. Plaintiffs also argued that the remedial justification could be raised only by the University. In the law school case, similar arguments were made by all parties at trial.

The district court in the *Gratz* case ruled in favor of the University on the issue of whether diversity was a compelling state interest, and found that the specific current policies of the University were narrowly tailored to that interest (App. 1a). However, the court subsequently granted summary judgment against intervenors, holding that since the University had not advanced a remedial justification, its admissions practices could not be justified on remedial grounds, regardless of proof of discrimination. The court also found intervenors' uncontested evidence of past and present discrimination insufficient as a matter of law. App. 66a.[4]

2. The Court of Appeals

All parties appealed. The Sixth Circuit heard argument in both cases *en banc* on the same day. On May 14, 2002, that court reversed the decision in the law school case, holding that diversity was a compelling state interest and that the law school's admissions policies were narrowly tailored to that interest. *Grutter v. Bollinger*, 288 F.3d 732, 735 (6th Cir. 2002). The court did not address whether an interest in remedying past discrimination is sufficiently compelling for equal protection purposes. *Id.* at n.4. The court has not yet ruled on the appeals in the undergraduate case. *Id.* at n.2.

Plaintiffs in the respective cases have filed petitions for writs of certiorari to review the Court of Appeals' ruling in the law school case and the district court's ruling on their summary judgment motion in the undergraduate case. Intervenors are

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[4]The district court in *Grutter* ruled for plaintiffs, finding that diversity was not a compelling state interest and that the specific current policies of the University were not narrowly tailored (*see* App. 189a in *Grutter v. Bollinger*, No. 02-241). It also rejected the intervenors' remedial justification arguments as an alternative basis for a race-conscious admissions process (*id.*).

filing this petition so that the Court will also have before it the remaining issue decided by the district court, respecting intervenors' proffered evidence to support a remedial rationale for the University's admissions policy.

C. Factual Background

The University provided an extraordinary wealth of evidence in both the undergraduate and the law school case to support its assertion that there are significant benefits to an education in a racially diverse environment. This evidence distinguishes the value of diversity in the setting of a university, where the program itself is enhanced by diversity, from diversity in other settings. Intervenors will not endeavor to catalogue that evidence here and anticipate that it will be described by the University in its response to the *Gratz* plaintiffs' petition.[5]

The *Gratz* intervenors provided extensive and unrebutted evidence to support the conclusion that, but for the inclusion of race as one factor, among others, the University's admission criteria would have a disproportionate adverse impact on African-American and Latino applicants, and that such criteria are unnecessary to admit qualified students. Additionally, intervenors submitted extensive evidence that demonstrated a long-standing history of racial discrimination, exclusion, and isolation at the University which is currently manifested in a racially hostile environment on the

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[5]Plaintiffs did not challenge this evidence. Indeed, as the district court observed, "[p]laintiffs have presented no argument or evidence rebutting the University Defendants' assertion that a racially and ethnically diverse student body gives rise to educational benefits for both minority and non-minority students. In fact, during oral argument, counsel for Plaintiffs indicated his willingness to assume, for purposes of these motions, that diversity in institutions of higher education is 'good, important, and valuable'" (App. 25a).

undergraduate campus. Intervenors' evidence provides an alternative justification for the University's admissions programs: remedying past and present discrimination against African-American and Latino students and applicants. This evidence, which the University chose not to present (but did not contest), also provides context to the importance of diversity at the University.

1. The Discriminatory Impact of the Current Selection Criteria

Because of the number of applicants typical of large universities, Michigan has chosen to utilize grades and test scores using a formula (in this case reflected in the acronym "SCUGA") in making admissions decisions at the undergraduate level. The University considers its own rating of the applicant's high school ("S"), the rigor of the curriculum taken by the applicant ("C"), socio-economic disadvantage or under-represented minority status ("U"), the geographic residence of the applicant ("G"), and his or her alumni status ("A") (JA 3935). Plaintiffs challenged only the consideration of race or ethnicity as part of factor "U."

However administratively convenient they may be in distinguishing among non-minority candidates, four of these factors (plus the remainder of factor "U") have a statistically significant and consistently negative effect on the admissions chances of African-American and Latino applicants. For example, the University gives extra points to students who come from the upper peninsula of Michigan or whose parents were alumni. The additional points awarded under the geography and alumni factors are available almost exclusively to non-minority applicants (JA 1998, 3481). Under-represented minority applicants are — in part because of the discrimination that has persisted at the University — less likely to have alumni parents or relatives, and are disproportionately first-generation

applicants to college. As a result, they do not receive the benefit from the alumni factor that their white counterparts receive. The geography factor also exacerbates the effect of racial segregation in the state by giving extra points to students who come from one of the forty-five northern Michigan counties, all of which, in the highly segregated state of Michigan, are overwhelmingly white (JA 3482).

The school and curriculum factors have similar exclusionary effects due, in part, to the separate and unequal K-12 schooling offered in Michigan (JA 3478-79, 3699). The overwhelming number of minority high school students in Michigan attend schools that have relatively low "S" factor ratings, and relatively few minority students are in schools that earn high "S" factor ratings. The "C" factor, which assigns a greater number of points to applicants who have taken Advanced Placement and other honors courses, produces a similar discriminatory effect. Again, here, by virtue of the fact that African-American and Latino children are segregated overwhelmingly in schools that offer few, if any, honors courses, they are unable to benefit from this factor to the same extent as their white counterparts, even if they are achieving at the highest levels at the schools they do attend. Thus, simply by virtue of where they attend school, white students are able to earn "S" and "C" factor points that a disproportionate number of African-American and Latino students, regardless of their aptitude, simply cannot earn.

In sum, the use of the SCUGA factors would, if race and ethnicity were not separately considered as a factor in the admissions process, have a statistically significant disparate impact on minority applicants. Moreover, the use of race and ethnicity in the admissions process needs to be understood in the context of the University's long history of discrimination on campus.

2. The University's History of Discrimination

The uncontested evidence in the record reveals an extensive history of discriminatory treatment of African-American and Latino students by the University, the effects of which are seen today in the continued under-representation of such students on campus. These practices range from maintaining segregative and exclusionary practices on campus, refusing to take meaningful steps to recruit, enroll, and retain minority students, to ignoring, if not sanctioning, a campus climate that is often marked by racial hostility. Through the years, the University minimized or sidestepped criticism of its discriminatory practices by the federal government, state legislators, the Regents of the University, civil rights organizations, and its own faculty and students (JA 2261-83). Almost every significant effort to integrate minorities into the campus came through pressure by students and others, but it was not until the establishment of the Michigan Mandate in 1988 that the University began a significant effort to dismantle this pattern of racial exclusion.

a. 1817-1964: More than a Century of University Segregation and Discrimination

The University was founded in 1817; however, it was not until 1868 that the first African-American students were enrolled (JA 2265). The University segregated its own campus housing, and excluded students of color from fraternities and sororities into the 1960's, with the support of the University's administration (JA 3757).

From 1949 to 1952, the Michigan Civil Rights Congress and other groups called for an end to discriminatory clauses in the constitutions and by-laws of all campus organizations (JA 2266). However, then-University President Harlan Hatcher flatly rejected the proposal, and effectively allowed all University organizations to continue their discriminatory

practices. In 1959, one observer noted that, as of that year, "[n]o University fraternity chapter *had ever* accepted a Black student" (JA 2272) (emphasis added).

In contrast to its resistance to ending practices that segregated and isolated American racial and ethnic minority students, the University took affirmative steps to integrate its foreign students into the entire range of campus life, including by giving them priority over African-American students in both admissions and housing (JA 2270).

b. 1965-1980: The First "Mandate" — The Opportunity Program

Against the backdrop of more than one hundred years of segregation on the Michigan campus, the University announced the Opportunity Program, ostensibly designed to recruit and admit socially disadvantaged students to the University. While minority enrollment increased in the years after the announcement of the University's first "mandate" — the Opportunity Program — hostility aimed at students of color at the University persisted.[6] Minority students were still excluded from campus activities and university social traditions (JA 2274-75, 2276, 3768).

In 1966, the Department of Defense investigated the University's compliance with Title VI of the 1964 Civil Rights Act. The Department's report reflected Michigan's reputation among students and faculty as a school "basically for rich white students" and urged campus administrators to increase recruitment of black students, faculty and staff (JA 2270-71).

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[6]By 1966, 400 Black students were enrolled at the University, representing only 1.2 per cent of the total student population of about 32,000. At that time, nearly 55 per cent of Detroit's 300,000 elementary and secondary school students were African-American (JA 2265).

Nonetheless, the University's administrators did little to change its discriminatory policies.

In 1970, intense dissatisfaction with the University's failure to address campus racism and to increase minority enrollment culminated in a series of student strikes. In February of that year, a student group calling itself Black Action Movement ("BAM I") pressed the Regents and University administration to substantially increase African-American enrollment and increase financial aid so that African-American and Latino students, disproportionately poor, could matriculate if admitted (JA 2278-80). The enrollment proposal won support from many, including then-Governor William Milliken. However, University administrators rejected the proposal. Only after the BAM I students went on "strike" did the University agree to pursue some admissions and recruitment efforts (JA 2284-85). After the BAM I strikes, African-American presence on campus nearly doubled from 3.5 per cent of all students in 1970 to 6.8 per cent in 1972 (JA 2287).

However, with this modest increase in minority enrollment, the University continued to tolerate racial tensions on campus. Racial incidents in campus dormitories were widespread, prompting complaints of dehumanizing treatment of African-American students (JA 2293). Investigations of these incidents concluded that some staff members' racist attitudes — that were tolerated by the University — contributed to the problem (JA 2294-96). Rather than rectify the hostile environment on campus, the University exacerbated it in 1973 when it abandoned its short-lived minority admission and recruitment programs (JA 2289). Consequently, African-American enrollment plummeted, falling to a low of 4.9 per cent between 1973 and 1983 — its lowest level since 1970 (JA 2291-92).

In response, in 1975, minority students organized "BAM II," requesting increased support services and an effective institutional effort to address the persistent negative racial climate on campus (JA 2298). Then-President Robben Fleming refused both requests (JA 2299). With no minority recruitment and admissions effort in place, well-publicized discrimination on campus and no corresponding University redress, enrollment and retention rates of minorities continued to decline: between 1976 and 1985, the University lost a full 34 per cent of its African-American students (JA 3885).

c. 1980 - 1990: The Michigan Mandate

In 1980, a University sociology professor conducted a study of undergraduates at Michigan that found 85 per cent of African-Americans surveyed reported racial discrimination on campus from their peers, administrators or professors and more than 60 per cent stated that they had little or no contact with African-American faculty and staff (JA 2312-13).

In 1986 and 1987, a number of racist incidents occurred on campus — some of which would capture national media attention — including the dissemination of a racist flyer announcing "open season on porch monkeys . . . (regionally known as: Jigaboos, Saucerlips, Jungle Bunnies and Spooks)" (JA 2323) (emphasis omitted), and the broadcast of racist jokes on WJJX, the University's campus radio station (JA 3759-61). The WJJX incident received national press coverage and resulted in a hearing before the Michigan State Legislature (JA 2330). The University's own investigation concluded that the broadcast was "only a symptom of a pervasive atmosphere on this campus" (JA 2327).

On the heels of these incidents, then-provost James Duderstadt announced plans for a new initiative aimed at quelling racial discontent at the University. Duderstadt announced the Michigan Mandate, an effort that sought to

increase the number of students and faculty of color, to provide "equal opportunity" and "equal access to all educational resources to students from under-represented racial and ethnic" groups (JA 1378-79), to remedy institutional racism on campus (JA 1383), and to promote a more racially and ethnically diverse campus to prepare students for an increasingly multicultural world (JA 1376). The Mandate itself acknowledged the "prejudice, bigotry, discrimination and even racism" on the Michigan campus, as well as its goals of "remov[ing] institutional barriers to full participation in the life and leadership of [the] institution" (JA 1390).

d. Persisting Effects of The University's Long-Maintained Discrimination

Notwithstanding the Michigan Mandate, the negative and hostile climate at the University remains one of the manifestations of its discriminatory policies. Recently, as in previous years, the campus has been plagued by targeted racist actions against African-American and Latino students, including racist graffiti in the hallways of campus buildings and in dorm rooms; racially derogatory remarks and epithets;[7] and racist literature and lettering placed on campus buildings (JA 2393, 3751). Additionally, African-American and Latino undergraduate students endure more subtle forms of discrimination — negative racial stereotypes by professors and classmates, exclusion from campus clubs and social groups, racist remarks and "jokes," and lack of critical academic support — all of which can erode their sense of belonging at

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[7]In 1998, for example, an African-American junior awoke to find a note posted on her dorm room door with the words "two stupid bitches" and "niggar" [*sic*] along with two swastika symbols. Shomari Terrelonge-Stone, *'U' Prof. Studies Racial Tolerance*, THE MICHIGAN DAILY ONLINE, November 3, 1999, available at http://www.michigandaily.com (JA 3777-79).

the institution and their ability to form peer networks (JA 2396-2398, 2401, 2415).

Discriminatory treatment at the hands of University police is also endemic. In the 1999-2000 school year, African-American and Latino student groups on campus complained of being subjected to a substantially greater level of surveillance than predominantly white groups (JA 2408-10, 3752-53, 3740-41).

Such a negative racial climate can affect student performance and limits the informal learning, networking, and interacting that takes place with their peers outside the classroom (JA 2422). A negative racial climate tolerated and maintained over several decades also deters other African-Americans and Latinos from enrolling (JA 2389-91). Studies conducted by the University revealed that the primary concern expressed by more than one-third of the African-Americans and Latinos who chose not to apply as undergraduates was racism on campus (JA 3833, 3840).

REASONS FOR GRANTING THE WRIT

I

The Court Should Grant The Writ Before Judgment By The Court Of Appeals Because This Case Is Of Such "Imperative Public Importance" As To Require Immediate Determination In This Court

This Court may invoke its certiorari jurisdiction either "before or after rendition of judgment" by a court of appeals. 28 U.S.C. § 1254(1). *See also* 28 U.S.C. § 2101(e) ("An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court

of appeals may be made at any time before judgment."). However, the Court's rules counsel that "[a] petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11.

While the Court is "ordinarily reluctant to exercise [its] certiorari jurisdiction" before entry of a final judgment in the lower courts, *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997), it has not hesitated to grant certiorari in such circumstances when the issues raised are "of great significance and demand prompt resolution." *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981); *see also Mistretta v. United States*, 488 U.S. 361, 371 (1989) (certiorari granted before judgment in case challenging validity of sentencing guidelines adopted under Sentencing Reform Act of 1984 "because of the 'imperative public importance' of the issue, as prescribed by the disarray among the Federal District Courts"); *Brown v. Board of Education*, 347 U.S. 497, 498 (1954) (certiorari granted before judgment "because of the importance of the constitutional question presented"); 17 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4036, at 21 (2d ed. 1988) ("certiorari before judgment is occasionally granted simply because it is thought important that issues of great contemporary moment be settled quickly and finally") .

Intervenors respectfully submit that this case is of such "imperative public importance" as to warrant deviation from the normal appellate practice and to require determination in this Court at this time. The issue raised by this case — the circumstances under which it is constitutional for race or national origin to be used as a factor in the admissions process of public universities — has enormous implications for literally

millions of students.[8] As Justice Ginsburg (joined by Justice Souter) recently observed in a case involving the constitutionality of the admissions process at the University of Texas Law School: "Whether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance." *Texas v. Hopwood*, 518 U.S. 1033, 1034 (1996) (Opinion of Ginsburg, J., joined by Souter, J., respecting the denial of certiorari).

With some public universities able to take account of race and national origin in their admissions practices and others not, as a result of the split in the courts of appeals on this question, *see Grutter* Pet., No. 02-241, at 21-25; *Gratz* Pet., No. 02-516 at 20-24, and the Court's decision in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978) under siege, the time is right for this Court to announce definitive constitutional guidelines on this crucial issue. Just as there was "disarray" on a vital question of criminal law that impelled the Court to grant certiorari before judgment in *Mistretta*, so too (as the Eleventh Circuit recently observed) is there anything but unanimity regarding "the status of Justice Powell's *Bakke* opinion as binding precedent on the validity of student body diversity as an interest sufficient to justify race-based school admissions decisions," *Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d 1234, 1249 n.13 (11th Cir. 2001) (canvassing

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[8]In its most recent projections, the National Center for Education Statistics predicts that enrollment in degree-granting postsecondary institutions will increase from 15.3 million in 2000 to 17.7 million by 2012, an increase of 15 per cent. It also projects that enrollment in public 4-year institutions will increase from 6.1 million in 2000 to 7.2 million in 2012, an increase of 19 per cent. *See* National Center for Education Statistics, *Projections of Education Statistics to 2012* (31st ed. October 2002), available at http://nces.ed.gov/pubs2002.

wide variety of cases that have considered binding force of Justice Powell's opinion).

While there have obviously been developments in the Court's equal protection jurisprudence since *Bakke* was handed down, the Court has never returned to the subject of university admissions, nor has it "indicated that Justice Powell's approach has lost its vitality in that unique niche of our society." *Smith v. University of Washington Law Sch.*, 233 F.3d 1188, 1200 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001). Nonetheless, some lower courts have explicitly sought guidance from this Court on this question. *See, e.g., Johnson*, 263 F.3d at 1245 ("we think it important to underscore that the constitutional viability of student body diversity as a compelling interest is an open question, and ultimately is one that, because of its great importance, warrants consideration by the Supreme Court"); *Wessmann v. Gittens*, 160 F.3d 790, 795 (1st Cir. 1998) ("question of precisely what interests government may legitimately invoke to justify race-based classifications is largely unsettled").

We are "only a generation or so removed from the legally enforced segregation which was used to discriminatorily deny African Americans and other minorities access to education." *Grutter v. Bollinger*, 288 F.3d 732, 764 (6th Cir. 2002) (Clay, J., concurring). If the Court is to grant certiorari to address this profound question of public importance, it should do so in both *Gratz* and *Grutter*. It is hardly an exaggeration to say that the Court's decision in these cases will directly affect the lives not only of this generation of students but of generations of students to follow.

II

The Court Should Also Grant The Writ Before Judgment By The Court Of Appeals Because Similar And Related Questions Of Constitutional Significance Will Be Before This Court If It Grants Certiorari In *Grutter v. Bollinger*

This Court has granted certiorari before judgment in the court of appeals in those circumstances where similar questions have been presented in related cases. In the landmark school desegregation cases in the 1950's, for example, there were three cases pending in the Court involving the validity of state school segregation practices, and the Court took judicial notice that a separate case — *Bolling v. Sharpe* — challenging segregation in the District of Columbia schools was pending in the United States Court of Appeals for the District of Columbia Circuit. The Court then advised that it would "entertain a petition for certiorari" in *Bolling*, "which if presented and granted will afford opportunity for argument of the case immediately following the arguments in the three appeals now pending." *Brown v. Board of Education*, 344 U.S. 1, 3 (1952) (*per curiam*). The Court subsequently granted certiorari in *Bolling* one month later, and heard all of the cases together. *Bolling v. Sharpe*, 344 U.S. 873 (1952). The Court has granted certiorari before judgment in circumstances involving other related cases as well. *See, e.g., Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194-95 & n.5 (1978) (certiorari granted in case in which court of appeals had ruled and in second case presenting same question before court of appeals had ruled); *Taylor v. McElroy*, 358 U.S. 918 (1958), 360 U.S. 709, 710 (1959) (certiorari before judgment granted "because of the pendency here of *Greene v. McElroy*" (360 U.S. 474 (1959), which involved essentially the same important constitutional issues); *Porter v. Dicken*, 328 U.S. 252, 254 (1946) (certiorari

before judgment granted "by reason of the close relationship of the important question raised to the question presented in *Porter v. Lee*," 328 U.S. 246 (1946)).

In addition to granting certiorari before judgment in *Gratz* because it raises issues of great national importance, there are practical reasons for doing so. *Gratz and Grutter* raise many of the same constitutional questions: whether diversity is a compelling governmental interest sufficient to justify race-based school admissions decisions, and whether the consideration of race is narrowly tailored to achieve that interest. Among its evidence to support the educational benefits that result from a racially and ethnically diverse student body, the University proffered the same expert report in both cases. (*See* JA 1648-1831.)

Grutter presents the Court with the question of the constitutionality only of the University of Michigan's Law School admissions policies; it does not involve the University's undergraduate admissions policies. While similar in some meaningful respects, the two admissions policies are not identical. Law schools, because of their size, consider a far smaller number of applicants than do large undergraduate institutions such as the LSA. Somewhat more individualized examination of each application is therefore often possible at law schools, given the number of applicants; in contrast, at the undergraduate level at most large universities, such as Michigan, some numerical screening system (for example, assigning "scores" to a variety of admissions factors in order to identify groups of applicants whose academic qualifications or lack of qualifications are sufficiently obvious to support decisions to grant or deny admission without further examination) is utilized to facilitate individualized review in cases where it could make a difference. Thus, *Gratz* presents a different context in which to evaluate the permissible use of race in the admissions process.

Gratz presents an additional issue more starkly as well. The evidence in the record shows that diversity has educational importance not only in the classroom, but also in the myriad educational experiences that take place outside the classroom. Because of the nature of undergraduate education, these benefits are of particular importance for college students. Thus, a review of *Gratz* will allow this Court to evaluate fully all of the educational benefits of diversity.

When the Court announces (or revises) a broad constitutional rule, as it will likely do if it grants certiorari in these cases, it would not serve the administration of justice to have before it only the law school admissions program. The record has been fully developed in both cases, and, in granting certiorari in *Gratz* as well as *Grutter*, the Court would be able to fashion constitutional rules that would provide guidance for both undergraduate and graduate admissions programs.

III

The Court Should Grant This Writ To Consider Whether the Constitution Permits The Use Of Race And National Origin In College Admissions Upon A Showing That There Is A Strong Basis In Evidence Of Discrimination Even If That Showing Is Not Proffered By The University

The legal basis for taking race-conscious steps to remedy past and present discrimination is well-established. This Court has held that race-conscious remedies are constitutionally permitted where the public actor has a "strong basis in evidence for its conclusion that remedial action was necessary." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). The standard is satisfied by the establishment

of a *prima facie* case of a constitutional or statutory violation. *See id.* This remedial power extends not merely to correct past and present discrimination which the public actor has caused; it also permits race-conscious steps designed to avoid perpetuating discrimination caused by other public or private entities. *See, e.g., id.* at 492 (rejecting the argument that a governmental body only possessed the power to remedy the effects of its own prior discrimination, and holding that public entities have "a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private injustice"); *see also Coral Constr. v. King County*, 941 F.2d 910, 916 (9th Cir. 1991).

Despite the University's professed reliance on *Bakke's* diversity rationale in this litigation, a review of the record shows that a strong basis in evidence exists for remedial action to offset University admissions criteria that have an unnecessary disparate impact on otherwise qualified African-American and Latino applicants; to remedy the ongoing effects of the University's history of discrimination against minorities; and to counter the lingering vestiges of that discrimination, including the current negative and hostile racial climate on campus.

The district court found this evidence both unpersuasive and irrelevant, reflecting the uncertainty, if not confusion, among lower courts about the "strong basis in evidence" standard described in this Court's opinions in *Croson* and in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 291 (1986). Granting the writ sought by present petitioners will allow the Court to resolve that uncertainty and to clarify the law by settling such questions as: May the "strong basis in evidence" be presented by putative beneficiaries of race-conscious decision-making, or only by the governmental actor? Must this justification have been openly articulated by the governmental actor at the time the challenged policy was first adopted? What

degree of evidentiary showing is necessary to demonstrate the "strong basis" that will justify consideration of race or ethnicity by a governmental entity or actor? Because, as recognized in *Wygant*, public agencies are understandably reluctant to admit prior discriminatory conduct, clarification of the law in this area is of paramount importance and provides a persuasive reason for granting the writ here sought. *See Wygant,* 476 U.S. at 291(O'Connor, J., concurring) (noting that public employers might be "trapped between the competing hazards of liability to minorities if affirmative action *is not* taken. . . . and liability to non-minorities if affirmative action *is* taken.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 14, 2002